Supreme Court, U.S.
FILED
JAN 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-942

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1985

ALBERT JOHN FERN, JR.
PETITIONER

vs.

JOAN E. FERN,
RESPONDENT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Katherine E. Stoner
STONER, WELSH & SCHMIDT
P.O. Drawer H
Pacific Grove, CA 93950
(408) 373-1993

Attorneys for
Respondent JOAN E. FERN

28pp

QUESTIONS PRESENTED

(1) Should the United States Supreme Court decision in McCarty vs. McCarty (1981) 453 U.S. 210 be construed so as to retroactively invalidate a prior Judgment of Dissolution of Marriage which became final in 1978?

(2) If the McCarty decision would retroactively invalidate the Judgment, would the Federal Uniformed Services Former Spouses Protection Act (FSPA) 10 U.S.C. Section 1408 independently validate the 1978 Judgment without unconstitutionally depriving Petitoner of a personal entitlement?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	vii
JURISDICTION OF THIS COURT	vii
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	vii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE DECISION BELOW WAS PROPER AND DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT	4
A. This Court Has Already Dismissed An Appeal on the Retroactivity Issue	4
B. The Cases Invoked by Petitioner Do Not Require Retroactive Application of the McCarty Holding	9

TABLE OF CONTENTS

		Page
II.	NO SERIOUS CONSTITUTIONAL QUESTIONS ARE PRESENTED	12
III.	CONCLUSION	18
	CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

	Page
CASES:	
Chevron Oil Co. vs. Huson, 404 U.S. 97, 92 S. Ct. 349 (1971)	2,8
Chicot County Drainage District vs. Baxter Estate Bank, 308 U.S. 371 (1940)	9
Costello vs. United States, 587 F 2d 424 (1978)	11,12
Duke vs. Duke, 643 P 2d 1205 (Nev. 1982)	5
Duren vs. Duren, 627 SW 2d 585 (KY 1982)	5
Ex Parte Hovermale, 636 SW 2d 828 (Tex. App. 1982)	5
Federated Department Stores vs. Moitie, 452 U.S. 394 (1981)	6
Firestone Tire & Rubber Co. vs. Risjord, 449 U.S. 368 (1981)	6,7

TABLE OF AUTHORITIES

	Page
Holzager vs. Valley Hospital, 646 F 2d 792, 798 (2d Cir. 1981)	8
In re Marriage of Sheldon, 124 Cal. App. 3d 371 (1981)	1,2,3,4
McCarty vs. McCarty, 453 U.S. 210 (1981)	passim
McSparran vs. Weist, [3d Cir. 1968] 408 F 2d 867, cert. den. 395 U.S. 903	8
Pension Benefit Guaranty Corp. vs. R.A. Gray & Co., 467 U.S.___, 81 L.Ed. 2d 601 (1984)	13
Red Lion Broadcasting Co. vs. FCC, 395 U.S. 367, 380 (1969)	10
Reed vs. Allen, 286 U.S. 191 (1932)	6
Ridgway vs. Ridgway, 454 U.S. 46 (1981)	7

TABLE OF AUTHORITIES

	Page
United States vs. Larionoff, 431 U.S. 864, 869 (1977)	11,12
United States vs. Security Industrial Bank, 459 U.S. 70 (1982)	11,12
Vinson and Vinson, 644 P 2d 635 (Or. App. 1981)	5
STATUTES:	
Uniformed Services Former Spouses Protection Act (FSPA) 10 USC Section 1408	passim

OPINIONS BELOW

The opinions of the California Court of Appeal and the California Supreme Court are set forth in the Petition. The Order of the trial court is not reproduced in the Petition; however, it is accurately summarized in the opinion of the Court of Appeal, a copy of which is attached to the Petition at Appendix A.

JURISDICTION OF THIS COURT

Petitioners' basis for invoking jurisdiction, as set forth in the Petition, is 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes invoked by Petitioner are set forth in the Petition at Page 3.

STATEMENT OF THE CASE

In 1978, the marriage of Petitioner and Respondent was dissolved by Judgment of the Superior Court of California, County of Monterey. The Superior Court found a ninety per cent community property interest in Petitioner's vested military retirement benefits. The Court further found that Petitioner was then eligible to retire, and ordered him to pay to Respondent an amount equal to forty five per cent of each monthly benefit. Petitioner took no appeal from the Judgment and it became final.

Petitioner retired less than a year later. For a few years, Petitioner made monthly payments to Respondent. Then, in February of 1981, shortly before this Court rendered its decision in McCarty vs McCarty, (1981) 453 U.S. 210, Petitioner ceased making payments to Respondent.

In April, 1982, Respondent began enforcement proceedings in the divorce

action, seeking an Order determining arrearages due to Respondent and ordering Petitioner to recommence payment of future benefits by allotment.

After Petitioner unsuccessfully attempted to remove the enforcement proceeding to the Federal District Court, the matter was heard by the Monterey County Superior Court, which issued an Order fixing arrearages in the amount of $37,620.00 and requiring prospective payments to be made by allotment. Petitioner appealed from that Order, and the California Court of Appeal for the First District affirmed.

Petitioner now seeks review by this Court.

SUMMARY OF ARGUMENT

The California Court of Appeal correctly refused to apply the McCarty decision to invalidate the 1978 final divorce Judgment.

This Court has already declined to grant Review of the same question in an earlier case In re Marriage of Sheldon 124 Cal. App. 3d 371 1981), Appeal dism'd 456 U.S. 941.

There is no conflict with any other prior decision of this Court.

Finally, even if this Court were inclined to grant Review of the issue of the retroactive effect of the McCarty decision, no serious constitutional questions are presented when examining FSPA as applied to this case.

ARGUMENT

I. THE DECISION BELOW WAS PROPER AND DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

A. THIS COURT HAS ALREADY DISMISSED AN APPEAL ON THE RETROACTIVITY ISSUE.

The California Court of Appeal refused below to invalidate the 1978 final divorce Judgment on the basis of retroactive application of this Court's decision in McCarty vs. McCarty, supra, 453 U.S. 210.

The identical issue was presented to this Court several years ago in In re Marriage of Sheldon, supra 124 Cal. App. 3d 371 (1981), Appeal dism'd 456 U.S. 941 (1982), and this Court declined review of the matter. Since then, numerous courts in California and other community property jurisdictions have relied on this Court's refusal to intervene in Sheldon, in declaring that final State Court divorce Judgments dividing military retired pay are not to be retroactively

invalidated because of this Court's decision in McCarty.

Petitioner contends that the Sheldon Court applied the wrong standard in analyzing the retroactivity of McCarty. However, it is clear that the standard employed by the Sheldon Court is the correct one and that no other decisions of this Court provide applicible standards which would yield a different result.

The standard utilized in Sheldon was that developed by this Court in Chevron Oil Co. vs. Huson 404 U.S. 97, 92, S. Ct. 349 (1971). The Chevron Oil test requires a consideration of the following three factors: 1. whether the decision in question establishes new law by overruling clear past precedent; 2. whether the history, purpose and effect of the new law mandates retroactive application; and 3. whether retroactive application of the new law

would produce substantial inequity or hardship.

In applying this test to a State Court Judgment which had become final prior to the McCarty decision, the Sheldon Court concluded that McCarty had effectively overruled consistent and well settled California precedent regarding the divisibility of military retired pay.

Secondly, the Sheldon Court found nothing in the rationale underlying the McCarty decision which would mandate retroactive application. The majority opinion in McCarty articulated Congressional purposes of inducement into military service and encouragement of early retirement. In Sheldon, as here, retroactive application of McCarty would not further either of these Congressional interests, since in both cases, as in myriads of others involving final divorce judgments, the decisions regarding enlistment and retirement had already

been made.

Finally, an examination of the equities involved in a retroactive application of McCarty compelled the Sheldon Court to refuse to give retroactive application to McCarty. As the Court stated in Sheldon:

> In perhaps no other area of law is the need for stability and finality greater than marriage and family law.... To permit and in fact encourage the relitigation of property interests long after the issues were supposedly settled would merely serve to reopen old wounds and create new ones. There is no guarantee that the non-service member spouse would have assets sufficient to reimburse the service member for that portion of the pension rights which had previously been an awarded share of community property. Substantial hardship would result in cases where the non-member relied on the property settlement in converting his or her share into non-liquid assets. Moreover, a reallocation of property interests would likely constitute sufficient "changed circumstances" to trigger a second round of relitigation involving spousal support awards. Sheldon, supra, at 124 Cal App 3d 380.

The policy reasons underlying the decision in Sheldon are even more

compelling today. The Sheldon opinion has been echoed in numerous decisions of other State Courts, in California and elsewhere. (See the cases cited in the opinion below; see also Duke vs. Duke 643 P 2d 1205 (Nev. 1982), Vinson and Vinson 644 P 2d 635 (Or. App. 1981), Duren vs. Duren 627 SW 2d 585 (KY 1982), Ex Parte Hovermale 636 SW 2d 828 (Tex. App. 1982).

Countless individual litigants who stand to be directly affected by a retroactive application of McCarty have relied on Sheldon and other State Court decisions giving McCarty prospective application only. The prejudice to these individuals which would result from retroactive application has reached even greater proportions in the years which have ensued since McCarty was first decided.

The rationale limiting retroactivity in such cases was reiterated by this Court just a few days prior to the

decision in McCarty :

> A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause of action. We have observed that "the indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of res judicata to avert." Federated Department Stores vs. Moitie (1981) 452 U.S. 394, 396, quoting Reed vs. Allen (1932) 286 U.S. 191, 201.

It is clear that the lower Court here properly applied the standards enunciated by this court in refusing to give retroactive effect to the McCarty holding.

B. THE CASES INVOKED BY PETITIONER DO NOT REQUIRE RETROACTIVE APPLICATION OF THE McCARTY HOLDING.

In asserting that the McCarty holding must be applied to invalidate the final Judgment in this case, Petitioner relies primarily upon this Court's decisions in Firestone Tire & Rubber Co.

vs Risjord 449 U.S. 368 (1981) and Ridgway vs. Ridgway 454 U.S. 46 (1981).

However, neither of these cases is applicable here.

Firestone did not involve questions of Federal preemption, nor any issue of retroactivity beyond the very case under consideration. Firestone simply stands for the proposition that where a lower Court properly finds that it is without jurisdiction to decide a case, it may not then proceed to decide the merits on the ground that its decision on the jurisdictional issue represents a departure from precedent.

Similarly, Ridgway did not involve retroactive application of its preemption holding, but, like McCarty, dealt only with the case before it.

Petitioner contends that because McCarty dealt with Federal preemption, it rendered every prior State Court judgment dividing military retired pay void ab

initio. This is the now disfavored "Blackstonian view," which has become obsolete as the courts have adopted the more rational interests-analysis approach set forth in Chevron Oil, supra. (see McSparran vs. Weist [3d Cir. 1968] 408 F.2d 867, 887, cert. den. 395 U.S. 903).

In support of this proposition, Petitioner relies on the concurring opinion in Holzager vs. Valley Hospital 646 F. 2d 792, 798 (2d Cir. 1981). However, Holzager is inapplicable since it did not involve a prior judgment or principles of Res judicata.

Furthermore, the lead opinion in Holzager expressly followed Chevron Oil in discussing retroactivity.

As this Court had pointed out even prior to Chevron Oil:

> "The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects... questions of rights claimed to have become vested, of status, of prior determinations deemed to have

finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attentuion of the courts, state and federal, and it is manifest from numerous decisions that an all inclusive statement of a principle of absolute retroactive invalidity cannot be justified." Chicot County Drainage District vs. Baxter Estate Bank (1940) 308 U.S. 371, 374.

II. NO SERIOUS CONSTITUTIONAL QUESTIONS ARE PRESENTED

Assuming that this Court would retroactively apply its holding in McCarty to the final judgment in this case, Petitioner next contends that FSPA cannot be used to prevent such a result without unconstitutionally depriving Petitioner of a vested right.

There are two ways in which FSPA may be used to validate the final judgment here. First, it may be interpreted as a statement of legislative intent on the part of Congress that not only prospective State Court judgments but

also prior State Court judgments dividing military retired pay are valid, notwithstanding the Federal preemption found by this Court in McCarty. 1/

Here, it seems clear from the terms of the act itself that Congress intended to create a uniform rule with respect to pre-McCarty and post-McCarty State Court judgments by making FSPA applicable to pay periods after June 25, 1981. Under this approach, there is no retroactive "taking" involved but only a clarification of the previously established scheme.

An alternative application of FSPA would extend the actual requirements of the act to prior judgments. In this situation, the question is whether Congress may do so without violating Petitioner's Fifth Amendment rights.

1/ It has long been recognized that great weight is to be given to subsequent legislation which declares the intent of an earlier statute. Red Lion Broadcasting Co. vs. FCC 395 U.S. 367, 380 (1969)

Petitioner bases his attack on FSPA in this context on United States vs. Larionoff 431 U.S. 864, 869 (1977), Costello vs. United States 587 F. 2d 424,427 9th Cir. (1978) cert. den. 442 U.S. 929 (1979) and United States vs. Security Industrial Bank 459 U.S. 70 (1982).

These cases do not support Petitioner's constitutional claims with respect to FSPA. Rather, they stand for the proposition that, in order to survive a Fifth Amendment challenge, retrospective legislation must be clearly intended to be retroactive and must serve a legitimate purpose furthered by rational means.

In Larionoff for example, the Court's holding prohibiting retroactive application of changes in the Navy's variable re-enlistment bonus program was based on the "absence of a clear expression of Congressional intent... to

affect the rights of those service members who had extended their enlistments and become entitled to receive VRB's." 431 U.S. at 879.

In Costello, the Court upheld the validity of changes in the military retirement benefit system as applied to retired military personnel. Costello, like Larionoff, recognizes certain principles common to both concerning the ongoing compensatory nature of military retired pay. However, neither case deals with legislation made expressly retroactive, and neither case can be said to prohibit retroactive legislative alteration of the benefits scheme.

Security Industrial Bank, supra, 459 U.S. 70 is also inapplicable for the same reasons. That case held that a provision of the Bankruptcy Reform Act of 1978 was not intended to be applied retrospectively to destroy "traditional" property rights. Again, this Court's

emphasis was on the absence of a clear expression of Congressional intent.

FSPA was expressly made retroactive. Therefore, under the authorities set forth above it will survive a Fifth Amendment challenge so long as it serves a legitimate purpose furthered by rational means. See also Pension Benefit Guaranty Corp. vs. R. A. Gray & Co. 467 U.S.____,104 S. Ct. 2709, 81 L.Ed.2d 601 (1984)

An examination of the legislative history of FSPA discloses a comprehensive and rational approach to the conflicting interests involved in resolving the problems which arose following the McCarty decision, problems which were clearly acknowledged by this Court in rendering it's decision in McCarty:

> "We recognize that the plight of an ex-spouse of a retired servicemember is often a serious one...Congress may well decide, as it has in the civil service and foreign service context, that more protection should be afforded a former spouse of a retired servicemember. This

> decision, however, is for Congress alone. We very recently have reemphasized that in no area has the Court accorded Congress greater deference than in the conduct and control of military affairs." 453 U.S. at pp. 235-236.

The Congressional response to the invitation of this Court was careful and thorough and took into account the interests of servicemembers in designing the provisions of the act.

For example,, a State Court judgment dividing military retired pay will only be valid to the extent that the State Court has jurisdiction over the member by reasons of presence in the State (other than because of military orders), domicile or consent to jurisdiction. 10 U.S.C. Section 1408 (c) (4). In addition, the former spouse's interest is non-transferable, and terminates at his or her death. 10 U.S.C. Section 1408 (c) (2). Moreover, the direct payment provisions of the Act are strictly limited in numerous respects, and an

obvious effort to fairly balance the interests of the servicemember and the former spouse. 10 U.S.C. Section 1408 (b)(e).

Clearly, even if some other, more practical ways to balance these interests might be advanced (and Petitioner has not advanced any) it cannot be said that Congress acted irrationally or arbitrarily in recognizing the validity of final State Court judgments dividing military retired pay as marital property.

Therefore, even if this Court were inclined to give retroactive effect to it's decision in McCarty, the lower Court's decision to uphold the final judgment can be independently sustained on the basis of the provisions of FSPA without raising any serious constitutional issues to be reviewed by this Court.

III. CONCLUSION.

Petitioner has not stated any ground

for review of the decision below by this Court. The lower Court's decision does not conflict with prior decisions of this Court, nor does it raise any serious constitutional issues to be resolved here.

Therefore, the petition for a Writ of Certiorari should be denied.

Dated: January 24, 1986.

Respectfully submitted,
STONER, WELSH & SCHMIDT

By: _____
Attorneys for Respondent
JOAN FERN

CERTIFICATE OF SERVICE

I, KATHERINE E. STONER, attorney for respondent JOAN E. FERN, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the th day of January, 1986, I served copies of the foregoing Respondent's brief in Opposition to Petition for Writ of Certiorari on the several parties thereto, as follows:

1. On John O. Marsh, Secretary of the Army and Verne Orr, Secretary of the Air Force by depositing a copy of the document in a United States mailbox, with first class postage prepaid, addressed to William T. McGivern, Jr., Esq., Chief Assistant to the United States Attorney, 450 Golden Gate Avenue, 16th Floor, San Francisco, California 94102 and by depositing a copy of the Respondent's Brief in a United States mailbox, with first class postage prepaid, addressed to

Charles Fried, Solicitor General, Department of Justice, Washington D.C. 20530.

2. On Petitioner Albert John Fern, Jr., by depositing a copy of the Respondent's Brief in a United States mailbox, with first class postage prepaid, addressed to their counsel of record, Mattaniah Eytan, Esq., KAPLAN, RUSSIN, VECCHI, EYTAN & COLLINS, 332 Pine Street, 4th Floor, San Francisco, California 94104.

Katherine E. Stoner

Attorney for Respondent
JOAN E. FERN

STONER, WELSH & SCHMIDT
229 17TH sTREET
P.O. Drawer H
Pacific Grove, CA 93950
Telephone: (408) 373-1993